United States Postal Service *and* Ann Dolan. Case 12–CA–207188

December 6, 2018

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On July 16, 2018, Administrative Law Judge Michael A. Rosas issued the attached decision. The Charging Party filed exceptions with supporting argument and a reply brief, and the Respondent filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[2]

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[3] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. December 6, 2018

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Steven Barclay and *Rafael Aybar, Esqs.,* for the General Counsel.

Kelly E. Elifson, Esq., USPS Law Department, of St. Louis, Missouri.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried on May 21, 29, and 30, 2018, in Tampa, Florida. The Charging party, Ann Dolan, alleges that the United States Postal Service (Postal Service or Respondent) discharged her from her employment at the Ybor Processing and Distribution Center (the Ybor facility) on September 7, 2017,[1] in violation of Section 8(a)(3) and (1) of the National Labor Relations Act[2] (the Act) because she sought the assistance of the American Postal Workers Union, AFL–CIO and the American Postal Workers Union, Local 259, AFL–CIO (collectively referred to as the Union) and requested that the Union file grievances on her behalf. The Postal Service denies the allegations, contends that it sought to accommodate Dolan's requests to meet with available union stewards, and discharged her during her probationary period for legitimate business reasons which were consistent

[1] In its answering brief, the Respondent argues that the Charging Party's exceptions should be disregarded in their entirety for failure to comply with Sec. 102.46 of the Board's Rules and Regulations. Although the Charging Party's exceptions do not conform in all respects to the Board's Rules, they are not so deficient as to warrant disregarding, particularly in light of the Charging Party's pro se status. See *Budget Heating & Air Conditioning, Inc.*, 333 NLRB 199, 199 fn. 2 (2001), citing *A.P.S. Production/A. Pimental Steel*, 326 NLRB 1296, 1297 (1998) ("The Board typically has shown some leniency toward a pro se litigant's efforts to comply with our procedural rules.").

[2] Chairman Ring is recused and took no part in the consideration of this case.

[3] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Nonetheless, we do not rely on the judge's statement that, by informing the Respondent in an email of her request to her doctor to place a limitation on her work clearance so that she would qualify for a disability-related work accommodation, the Charging Party engaged in "manipulative efforts" that "significantly diminished her credibility." This assertion is contradicted by the Charging Party truthfully informing the Respondent that her doctor did not impose any work limitations. We find that this specific remark by the Charging Party about talking with her doctor to see if she could receive a disability-related work accommodation would not have diminished her credibility, and in any event, the judge's finding as to this emailed remark was not based on his observation of the Charging Party's testimonial demeanor. However, we do not think our decision not to rely on this specific statement by the judge has any bearing on his other credibility findings.

The Charging Party has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

In addition to excepting to the judge's dismissal of the 8(a)(3) allegation, the Charging Party also excepted to the judge's failure to find that the Respondent violated her rights under *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), by not permitting her to have a union representative present when she received her evaluation. However, we find it unnecessary to pass on that exception because the General Counsel did not allege in the complaint that the Respondent violated Sec. 8(a)(1) by interfering with the Charging Party's right to have a union representative present at an investigatory interview.

In affirming the judge's finding that the Respondent met its *Wright Line* rebuttal burden, we do not rely on the judge's citation to *Tinney Rebar Services, Inc.*, 354 NLRB 429 (2009), a case decided by a two-member Board. See *New Process Steel, L.P. v. NLRB,* 560 U.S. 674 (2010).

[1] All dates refer to 2017 unless otherwise indicated.

[2] 29 U.S.C. §§ 151–169.

with Postal Service policy.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Postal Service, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Postal Service provides postal services for the United States and operates various facilities throughout the United States in performing that function, including a facility located at 1801 Grant Street, Tampa, Florida, the only facility involved in this proceeding. The Postal Service admits that the Board has jurisdiction over it and this matter by virtue of Section 1209 of the Postal Reorganization Act[3] and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Ybor Processing and Distribution Center

The Ybor facility is a Postal Service facility that engages in incoming and outgoing mail processing operations. Dan Fisher and Jeremy Wray are managers of distribution operations (MDO), whose primary responsibility is managing supervisors. Robyn Flick and Regina "Gigi" Johnson, as acting supervisors of distribution operations, issue the craft employees' daily schedules and ensure that employees in their sector complete all necessary tasks. During the relevant time period, Draven Leto was a supervisory trainee who had supervisory authority.

Dolan, the Charging Party, was appointed by the Postal Service as a Postal Support Employee (PSE) on August 5. PSEs are assigned flexible work duties. They are employed up to 360 days at a time, are then let go for 5 days, and typically return to employment. Upon returning, PSEs restart as new and, thus, probationary employees. As probationary employees, they are evaluated at the 30th, 60th and 80th day intervals.

B. The Bargaining Unit

The following employees of the Postal Service constitute a unit (the unit) appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees in the bargaining unit for which APWU has been recognized and certified at the national level: maintenance employees, motor vehicle employees, postal clerks, mail equipment shops employees, material distribution centers employees, and operating services and facilities services employees; excluding managerial and supervisory personnel , professional employees, employees engaged in personnel work in other than a purely non-confidential clerical capacity, security guards as defined in Public Law 91-375, 1201(2), all Postal Inspection Service employees, employees in the supplemental work forces as defined in Article 7 of the collective-bargaining agreement between Respondent and APWU, rural letter carriers, mail handlers, and letter carriers.

Since on or before May 21, 2015, the Union has been the designated exclusive collective-bargaining representative of the unit and responsible for administering the collective-bargaining agreements between Postal Service and the Union on behalf of unit employees employed at the Ybor facility and other Postal Service facilities in Tampa, Florida. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which is effective, by its terms, from May 21, 2015, to September 20, 2018 (the CBA).

C. The Disciplinary Process

The applicable collective bargaining agreement between the Union and the Postal Service (the CBA) sets forth the disciplinary procedure at Article 16. It is premised on the basic principle "that discipline should be corrective in nature, rather than punitive." The CBA further provides that "[n]o employee may be disciplined or discharged except for just cause" and subjects such action to the grievance-arbitration procedure.

Consistent with the CBA, a Memorandum of Understanding between the Union and the Postal Service (the MOU), dated February 27, 2013, contains several provisions pertinent to the discipline of PSEs:

> PSEs may be disciplined or removed within the term of their appointment for just cause and any such discipline or removal will be subject to the grievance arbitration procedure, provided that within the immediately preceding six months, the employee has completed ninety (90) work days, or has been employed for 120 calendar days, whichever comes first.
>
> The parties agree that the [PSEs] who have successfully completed either a 90 day work day or a 120 calendar day period within the preceding six months may be disciplined within the term of their appointment for just cause. The parties further agree that such discipline is subject to the grievance-arbitration procedure.
>
> The parties recognize that removal is not the only mechanism available to correct deficient behavior when warranted.
>
> The full range of progressive discipline is not always required for PSEs; however, the parties agree that an appropriate element of just cause is that discipline be corrective in nature, rather than punitive.[4]

As a probationary employee, however, article 12 clarifies that the disciplinary process outlined in the MOU was not applicable to Dolan during her probationary period of employment except in certain situations:

> A. The probationary period for a new employee shall be ninety (90) calendar days. The Employer shall have the right to separate from its employ any probationary employee at any time during the probationary period and these probationary employees shall not be permitted access to the grievance procedure in relation thereto. If the Employer intends to separate an employee during the probationary period for scheme failure, the employee shall be given at least seven (7) days advance notice of such intent to separate the employee. If the employee qualifies on the scheme within the notice period,

[3] 39 U.S.C. §§ 101, et seq.

[4] GC Exh. 22.

the employee will not be separated for prior scheme failure.[5]

D. Ann Dolan

Dolan's employment with the Postal Service spans a period of 20 years. She started as a casual employee in 1998, then moved into other positions, including data conversion operator, mail carrier, and eventually to a PSE position in late 2016. Dolan received no formal discipline prior to 2017. Her educational background includes a college degree, a graduate school degree, and a practical nursing certificate.

In January 2017, Dolan was laid off from her PSE position because of a lack of work and placed on the PSE rehire list. The rehire list is created based on an employee's seniority and initial start date in that capacity. In April, Dolan took urine and background tests, but was not rehired at that time. On July 7, Dolan was notified by human resources employee Vicki Plummer about the possibility of being rehired. On July 12, Dolan was notified of an effective start date of July 22. Her start date, however, was placed on hold on July 17 when she was informed that the medical unit needed to evaluate her application. In an email to Dolan, Plummer stated:

> You should hear back from someone at Ybor by Friday. But I just remembered, you answered 'Yes' to two of the medical questions and your paperwork has been forwarded to the Medical Unit for review. You will be contacted by someone at the Medical Unit and then by someone at Ybor.[6]

Keith Beattie, an employee in the Postal Service's occupational health services department, requested applicable medical information from Dolan on July 20. On August 2, Beattie followed up with Dolan to remind her that he was still waiting for the completed forms from her doctor. Dolan replied:

> I spoke to the Dr. Chaumont's office today and they will have the forms faxed to you by Friday. There was a hold up with Mia having a few days of and getting the surgeon's records with the needed documentation. The surgery was in May 24, 2010.
>
> They have what they need now, so it is just filling out your paperwork . . . the surgeon did not give me limitations; however, I told Dr. Chaumont that 8 hours is enough on my feet, if he had to put a limitation. I worked the ten and twelve hour shifts at Christmas, but I would prefer not to. There was a young girl at Christmas that only worked 8 hours a day and she said she had a note from her doctor.
>
> Thanks for your patience. Please call if you need to.[7]

On August 4, Beattie received the doctor's report, which cleared her to work with no restrictions. He also informed Dolan at that time that, since the next pay period started the next day, she would probably start the next one on August 19.

While waiting to be medically cleared, Dolan was informed by Plummer that the available PSE positions at the Ybor facility had been filled. On August 7, Plummer informed Dolan that her effective date would be changed from July 22 to August 5.[8] On August 9, Dolan complained to Beattie about being passed over for the job:

> Thanks Keith. I will keep you posted, as I will have to contact the surgeon for this. I have proved that I am qualified to perform the essential functions of the job; however, I will inquire into the requested limitation caused by my disability.
>
> I disagree with the process of being offered a job in Ybor, after being on the rehire list, only to have it taken away by someone junior to me. From my brief understanding, of ADA laws, a medical inquiry can only be requested after a conditional offer of a job or if there was some reason in my prior performance that required it. I did not delay my start date, management did. There was nothing in my prior performance to question my abilities, as I was a qualified employee.
>
> I was unsure of how to answer questions, on the medical form and was penalized for over thinking. I disclosed my back problems on November 2016, when I was hired for the Christmas season. I do remember writing about my back on a form. I proved that I had the skills to do the job in Christmas 2016.
>
> I spent money with the medical request and lost money with the delayed start date and now the conditional Ybor position has been taken away by someone junior to me, who did not go through a medical.
>
> This sounds wrong to me and I question, if it is legal; specifically, discrimination. Offering me a different job location changes the conditional offer that allowed them to request the medical in the first place. I signed off on the job in Ybor. Management delayed my rehire, as they hired juniors to fill my place, who did not go through medical. They are supposed to go in order, on the rehire list.
>
> Every person who takes some type of prescription medication should answer, "yes" to the question on the medical form, "Are you in treatment or. . . ." All prescription medications can potentially effect job performance. All applicants in the same job category who are under the care of a physician should be required to have a medical inquiry. If the question had the word, "and", it would clarify the question and required information. For example, beta blockers can make a person dizzy, sleepy or depressed. I am sure there are people taking medications that answered, "no" to the question, but these meds can impair a person. I worked Christmas and the behaviors of many of the workers were questionable.
>
> Sorry for the length, but I feel like I have been wrongly treated and I have lost money, because of this. A conditional of-

[5] A "scheme failure" was not explained in the record. Nor is there any indication that the term was ever applied to Dolan.

[6] GC Exh. 18.

[7] Dolan's manipulative efforts to dictate the contents of her doctor's report significantly diminished her credibility. (GC Exh. 20.)

[8] Since Dolan was cleared to start the next pay period, it is unclear what position was "taken away" from her. In any event, the August 5 effective start date remained in Dolan's record even though she started 12 days later. This was an oversight by the Human Resources department. (GC Exh. 164–19.)

> fer, based on a seniority list, needs to be followed; especially, if there is a medical inquiry; otherwise it can appear to be discrimination.[9]

On August 11, Dolan emailed Plummer about reporting to work on August 14. In this email, Dolan questioned the legitimacy of the rehiring process, complained about losing a week of work, mentioned that she contacted the Union, and threatened to file a grievance:

> I am still waiting to report to Ybor, since that is what I was canvassed for about a month ago. It appears that the seniority list is not followed, if there is a medical inquiry and juniors can fill the position that I was canvassed for. I do not agree with this for many reasons.
>
> Can you please let me know if I will be reporting to Ybor at 8 p.m.? That is the conditional offer that I signed off on, before the medical inquiry and planned on an 8 pm start time. It does not make any sense that I lost my seniority, because of a medical inquiry and juniors took the conditional offer.
>
> Debbie was supposed to get back to me, but did not. I can forward you the emails, if you want. I have lost another week of work, because of this and have contacted the union for assistance and possibly filing a grievance. Thank you for your assistance.

This email was forwarded to human resource office employees Marisol Ongrady and Dana Cowgill because Plummer was out of the office that day.[10]

Dolan began orientation as a PSE on August 17, and was told by Fischer to report to work at 10 p.m the next day. When she reported to work on August 18, Dolan was instructed by Angela Lewis, at Wray's directive, to clock out and clock back in at 10:30 p.m. There was confusion again on August 25 when Dolan tried to clock in at 9 p.m. but was told by supervisors Flick and Johnson to clock in at 10:30 p.m. Dolan claimed that she was scheduled on the workplace bulletin board with a start time of 9 p.m. She asked for a union representative but none was present. She went to her car, filled out a grievance form, and punched in at 10:30 p.m. Dolan gave the form to a union representative at 10 a.m. In her grievance, Dolan complained about her delayed start date and inability to clock in as scheduled.[11]

E. Dolan's Performance and Complaints During Her Tenure

Dolan's PSE duties included operating the automated parcel and bundle sorters and temporarily relieving career employees at their stations. She was previously certified to operate the automated parcel and bundle sorters but had not been recertified or trained in operating these machines at the Ybor facility.[12]

Breaks became an issue during Dolan's brief tenure. She was supposed to get a break after working at least 2 hours and, over the course of an 8-hour shift, an additional 30-minute break and two 15-minute breaks. Dolan, however, was not given breaks at regularly scheduled intervals when assigned to the small parcel bundle sorter, as was the case with the career employees. Generally, PSEs have to wait for the career people to return from break before they can take one. Dolan complained about the loose enforcement of the break policy and spoke to a union representative about it.[13]

During one shift during the Labor Day weekend, around September 1 to 3, all of the relief employees were told to take breaks early in their shifts. Johnson instructed Dolan to take her lunch break an hour before her scheduled time. Dolan told Johnson that this should not be happening and she complained to the Union about her breaks. Johnson replied that she was simply carrying out Wray's policy. On the way to clock out, Dolan ran into Fischer and complained to him. Fischer went to Johnson and told her that there were fixed times for breaks, which could only deviate 15 minutes either way, and that the machines did not have to run fully loaded and be in sync with the career employees' schedules. He told Dolan that Johnson responded that she did not know. It happened again, however, on another unspecified occasion when Johnson told Dolan to take her break about a half hour after her required time.[14]

As Dolan's supervisor, Flick had one discussion with Dolan about her job performance prior to September 7. Flick explained that Dolan failed to follow instructions, took long breaks and routinely complained about the work assignments she was given.[15]

F. Dolan's Discharge

Dolan clocked into work on September 6 sometime between 9 and 10:30 p.m. At the beginning of the shift, she was assigned to perform relief work by Johnson or Flick. Around 12:30 a.m. on September 7, Supervisor Angela Lewis called her to a meeting in her office and said that Dolan did not clock back in from lunch the prior day. Dolan apologized, saying "I thought I did." Dolan asked Angela Lewis to present the clock rings with her missing time punch but Angela Lewis did not provide her with any clock rings. Dolan later got the clock ring information from supervisor Mike Spanos and spoke with a

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[9] Dolan's initial discrimination claim was limited to the Human Resources department and the record does not reflect that any Ybor facility supervisors became aware of these allegations. (GC Exh. 20.)

[10] GC Exh. 18.

[11] GC Exh. 21.

[12] Dolan's rambling explanation of her job duties amounted to a medley of unsubstantiated obfuscation – the failure to provide her with recertification or retraining on a machine that she previously operated; and the improper assignment of relief work that was either not within her job description or was within the realm of career employees' duties. (Tr. 111–115.)

[13] I did not credit Dolan's uncorroborated hearsay testimony that a union representative told her that breaks were a repetitive problem that the career employees complained about or that the problem with early or late breaks was due to Wray's insistence that the machines run continuously. (Tr. 100–101.)

[14] I credited Dolan's undisputed testimony regarding statements made by supervisors as opposing party statements pursuant to Fed.R. Evid. 801(d)(2).

[15] Dolan denied Flick's assertion that they had any formal discussion prior to September 7 or that she told her that she needed to improve. However, I found Flick more credible than Dolan on this point because the latter conceded that she refused work when she believed that it was outside the scope of her job duties or inconsistent with her medical condition. (Tr. 37, 50–51, 66, 108–111, 125–126.)

union representative about the clock ring issue.[16]

At some point during Dolan's shift, Leto assigned her to perform mail handling along with four others. Mail handling, which consists of bringing mail to mail processers, is typically done by workers in the motor or manual craft.[17] Dolan complained to Leto and the Union about being assigned mail handler work that she was not medically qualified to perform, and told a Union representative that another employee had similar complaints.[18]

At about 3:15 a.m., Johnson asked Leto for employees to relieve the career employees on the small parcel bundle sorter (SPB). He sent her Dolan. Dolan, however, wanted to take a break. Johnson asked her to wait about 10 minutes and to tidy up the area, sweep the bins and pick up mail from the floor. Dolan took a break 10 minutes later and left the area. Johnson returned to the SPB area at several 10 minute intervals thereafter to find Dolan nowhere in sight and the mail piling up on the floor.[19]

Dolan did not return to the SPB area because, as she left the locker room after her break, she encountered Angela Lewis, who asked "are you here?" Dolan acknowledged her availability without mentioning her assignment to the SPB machine. Angela Lewis told her to sort mail and, when done with that, to go work in another area on the other side of the building.[20] After completing those tasks, Dolan spoke with another supervisor, Curtis Lewis, who asked her to move boxes. After finishing that task, Dolan asked Curtis Lewis what time she should show up for work the next day. He called to confirm the time and, suddenly, told Dolan that she needed to go talk to Wray.

When she got to Wray's office, Flick said it was time for her 30-day review. Dolan told her she had only been working for 21 days. Johnson said that Dolan never returned to the SPB machine after her break and asked where she went. Dolan responded that she was not told to go back to the machine and requested a union representative. Flick said she did not need a union representative for an evaluation.

Flick started the meeting by reading Dolan's evaluation form.[21] All of the categories were marked unsatisfactory and no explanations were provided. As they went through the evaluation, people walked in and out of Wray's cubicle area, including Curtis Lewis, Angela Lewis, and Leto. After reading the evaluation, Flick informed Dolan that she was being separated from the Postal Service. After Dolan refused to sign at the conclusion of the evaluation, the form was cosigned by Johnson. The separation document noted violations of ELM regulations 665.13 and 665.15: unsatisfactory performance and failure to follow instructions.[22] Flick recited Dolan's failure earlier that morning to return to the SPB machine, which Johnson assigned her to, after her break.[23] This event was subsequently documented by Johnson in an email sent to Wray at 6:20 a.m. on September 7.[24]

After being informed of her termination, Dolan asked to speak with a union steward, but none was available. Flick told her that she could get one on her own at a later time. Dolan requested a copy of her time clicks, received them, and then left the supervisors' office without signing her evaluation form. She was escorted to the locker room by Flick and Johnson, gathered her belongings, turned in her badge and time card, and left.[25]

G. Evaluations and Discipline of Other Employees at the Ybor Facility

The evaluation or discipline of Dolan and other employees at the Ybor facility in 2016 and 2017 varied depending on whether they were probationary or nonprobationary employees.

Probationary PSE Tiarra Cheathem received unsatisfactory ratings in all but one category in her 30-day evaluation; she received a satisfactory rating for "work relations." Fulfilling that category was defined to mean that she maintained positive working relations with others, worked harmoniously with others in getting the work done, and cooperated well with coworkers, supervisors and others with whom he/she came into

[16] Dolan's testimony about the clock rings, none of which were introduced into the record, was inconsistent and unclear. She also conceded that she did not clock in after lunch as she was supposed to. (Tr. 103-108.)

[17] Dolan says she was neither in the proper craft nor medically cleared to perform mail handling work. However, PSEs are expected to work wherever they are needed, (Tr. 182–184), and Dolan was approved by her doctor to work without any medical restrictions. (GC Exh. 20.)

[18] Dolan's claim that she contacted the Union on behalf of herself and a similarly situated employee was not documented in an official grievance nor was it otherwise corroborated by the record. I give no weight to any uncorroborated hearsay statements allegedly made by other employees or Union representatives to Dolan regarding this issue. (Tr. 109–110.)

[19] Dolan's assertion–that she was essentially free to wander the facility because Johnson did not specifically instruct her to SPB machine after her break—was not credible. (Tr. 115–118.) Johnson credibly testified that Dolan was assigned to staff the SPB and, in Dolan's absence, mail piled up in her section. (Tr. 136–138.) Wray also confirmed that PSEs are expected to continue providing relief at their assigned stations until a supervisor determines otherwise. (Tr. 182–184.)

[20] Dolan did not inform Angela Lewis that she was doing SPB relief for Johnson prior to her break. At a minimum, Dolan should have made her aware of this fact before accepting a new assignment.

[21] GC Exh. 12.

[22] Contrary to the General Counsel's assertion, Wray's initial testimony that Flick was responsible for recommending Dolan's separation was not inconsistent with subsequent testimony that it was a group decision. Flick initiated the separation process, but required approval at the MDO level to move forward. (GC Exh. 14; Tr. 19–199.)

[23] I found Wray's denial more credible than Dolan's assertion that he told her that she had been trouble since day one or had a penchant for contacting her steward. (Tr. 123, 170.) Flick, Johnson and Wray credibly testified that Flick was the only supervisor to speak with Dolan during the meeting, which lasted less than five minutes and occurred sometime between 5:00 and 6:00 a.m. All three also credibly testified that no other supervisors participated in the meeting except for themselves and Dolan, (Tr. 59-60, 69-70, 141, 152, 168-170), while Dolan was unable to provide a coherent timeline or consistently describe which supervisors attended. (Tr. 108, 120-125).

[24] GC Exh. 15.

[25] I did not credit Flick's testimony, however, that Dolan resisted giving up her badge and time card when asked. (Tr. 60.) Dolan denied that assertion and Johnson, who assisted in escorting Dolan out of the facility, made no mention of such difficulty. (Tr. 125, 142.)

contact. She went on to complete her 90-day probation, receiving at that time satisfactory ratings in every category.[26]

Other probationary employees were not as fortunate and were separated without an evaluation. Mail handler assistant Ian Hancock was recommended for separation after 36 days and separated the following day (June 2017). Hancock's deficiencies included unsatisfactory performance and failure to follow instructions. PSE Angelic Drew was recommended for separation by the Postal Service 52 days after her appointment and separated about a week later. Drew's behavior included multiple occasions of not being in her assigned area, failure to follow instructions, unsatisfactory performance, and unsatisfactory attendance (May 2017).[27]

In contrast, non-probationary employees were afforded investigative interviews and other procedural protections pursuant to Article 15 of the CBA, and generally received warning letters for misconduct or deficient performance: mail handler assistant Sharla Atakpa—unsatisfactory performance and failure to follow instructions by leaving her workstation without authorization and ending her tour after being instructed to remain at her station (May 2016);[28] mail handler Matthew Gard—failure to follow instructions on a particular occasion when he was instructed to remain working but clocked out with other employees (January 2017);[29] manual clerk Louis Colon, Jr—unsatisfactory performance and failure to follow instructions (August 2017);[30] mail handler Doshain Blake—failure to follow instructions to report to a particular machine and dispatch mail (September 2017);[31] and mail handler Katie Thompson—failure to perform her job duties and leaving her work station without permission (December 2017).[32]

PSE clerk Jordan Bronson, a casual/transitional employee, was the exception. Bronson initially received a 30-day evaluation that included unsatisfactory ratings for all but two categories – work relations and personal conduct. Although undated, the report indicated that it was to be completed by May 3, thereby implying that Bronson's appointment date was on or about April 3. Subsequently, Bronson encountered difficulties and, on June 7 was removed and terminated for unsatisfactory performance and failure to follow instructions.[33]

Legal Analysis

I. APPLICABILITY OF *WRIGHT-LINE* TEST

In determining whether Dolan was subjected to adverse employer action because she engaged in protected or union activity, the appropriate test is found in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved at *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983). The General Counsel must initially show the employee's protected activity was a motivating factor in the decision to terminate. See *Coastal Sunbelt Produce, Inc. & Mayra L. Gagastume*, 362 NLRB 997, 997 (2015) ("Under *Wright Line*, the General Counsel has the initial burden to show that protected conduct was a motivating factor in the employer's decision"). Establishing unlawful motivation requires proof that: "(1) the employee engaged in protected activity; (2) the employer was aware of the activity; and (3) the animus toward the activity was a substantial or motivating reason for the employer's action." *Consolidated Bus Transit, Inc.*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009) (unlawful motivation found where the employee became active in union activity, the employer was aware that he was leading employee meetings, and the employer singled out the employee for testing).

If the General Counsel prevails, the burden shifts to the Postal Service to prove that it would have terminated Dolan regardless of her protected concerted activity. *Wright Line*, 251 NLRB at 1089; *Manno Electric,* 321 NLRB 278, 281 (1996) (employer's affirmative defenses failed to establish that it would have transferred the workers to new job sites regardless of their union activities). An employer may not offer pretextual reasons for discharging an employee. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007) (finding that employer's reliance on a minor infraction and a claim of insubordination were pretexts for discharging an employee); *Golden State Foods Corp.*, 340 NLRB 382 (2003) (noting that there is no need to perform the second part of the *Wright-Line* test if the reasons for discharge are merely pretextual.

II. THE POSTAL SERVICE'S KNOWLEDGE OF DOLAN'S UNION ACTIVITIES

Ann Dolan engaged in activity protected under Section 7 of the Act when she emailed Plummer, Grady, and Marigold about her intent to file a grievance with the Union over the arbitrary changes to her start date, and again when she filed a grievance over that issue and her schedule. In determining the significance of such activity within the *Wright-Line* framework, the Board is quite alert to the technique of employers "laundering" a "bad" motive by forwarding a "dispassionate report" to neutral supervisors or superiors. *Boston Mutual Life Insurance. Co. v. NLRB*, 692 F.2d 169, 171 (1st Cir. 1982). Here, however, there is no evidence that any such conspiracy is afoot. Plummer, Grady, and Marigold worked in the Postal Service's Human Resources Department and there is no evidence that information from that portion of the process ever made its way to Wray or Flick.[34]

Subsequently, however, supervisors Flick and Johnson were both present when Dolan asked for a union representative, and one of these two supervisors permitted Dolan to see a union representative once they arrived at the facility. Dolan also complained to Fischer and Johnson about not getting her breaks at the appropriate time, and informed the latter that she brought

[26] GC Exh. 2c.

[27] There is no evidence that either received an evaluation prior to their separation. (GC Exh. 2a-2b, 3.)

[28] GC Exh. 5.

[29] GC Exh. 6.

[30] GC Exh. 8.

[31] GC Exh. 9.

[32] GC Exh. 10a-c.

[33] Although the record suggests that Bronson was terminated approximately 60 days after his appointment as a "transitional/casual" employee, there is no information as to why he was not considered a probationary employee.

[34] In fact, Flick unequivocally and credibly denied having any knowledge of Plummer.

that issue to the Union's attention. It is inapposite that Wray, the supervisor whose approval was needed to terminate Dolan, may have lacked direct knowledge of Dolan's union activities. *Boston Mutual Life Insurance*, 259 NLRB 1270, 1282 (1982), enfd. 692 F.2d 169 (1st Cir. 1982) (finding a Section 8(a)(3) violation even though the management official who ultimately fired the complainant was unaware of that employee's union activity). Under Board law, a manager's or supervisor's knowledge of an employee's union activities is generally imputed to the employer. *Collins & Aikman Corp.*, 187 NLRB 620, 625 (1970) (imputing knowledge to the employer where two supervisors had direct knowledge of employee's solicitation of union interest signatures); cf. *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82 (1983) (holding that there is no imputation of knowledge as a matter of law where the employer affirmatively establishes that the supervisor did not pass on knowledge of union activities to others).

III. LACK OF ANIMUS TOWARD DOLAN'S UNION ACTIVITIES

Unlawful motive can be proven by direct evidence or circumstantial evidence of general animus. See *Lewis Grocer Co.*, 282 NLRB 166 (1986) (finding unlawful motivation based on the suspicious timing of discipline and respondent's knowledge that the discriminatee was involved in a Board investigation). It is undisputed that Dolan engaged in union activity and the Postal Service was aware of this activity. However, the General Counsel failed to demonstrate that the Postal Service displayed animus towards this protected conduct. *Aileen, Inc.*, 218 NLRB 1419, 1422 (1975) (dismissing an 8(a)(3) claim where discriminatory motive was not proven by a preponderance of both direct and circumstantial evidence).

A. Dolan's Requests for Union Assistance

Dolan filed a single grievance complaining about her delayed start date by human resources personnel and initial scheduling at the Ybor facility. There is no evidence, however, that the Flick, Johnson, or Wray were ever made aware of it. See *Port-A-Crib, Inc.*, 143 NLRB 483, 484 (1963) (finding the employer's incomplete or nonexistent knowledge of the discriminatees' limited union activities was a compelling factor in rejecting retaliation claim). Moreover, whenever Dolan asked a supervisor to consult with the Union, she was able to access a union steward as soon as one was available. Her supervisors never inquired as to why she sought union assistance, and there is no evidence that her supervisors failed to properly follow proper protocols when employees asked for union assistance. At no time did any of Dolan's supervisors express annoyance towards Dolan's union activities. See *Keller Mfg. Co.*, 272 NLRB 763, 765 (1984) (rejecting a Section 8(a)(3) retaliation claim where the employee engaged in limited union activity, including picketing, attending union meetings, and signing an authorization card).

B. Alleged Disparate Treatment

The General Counsel contends that Dolan was treated disparately in comparison to other employees. *Fluor Daniel, Inc.*, 304 NLRB 970, 970-971 (1991), enfd. 976 F.2d 744 (11th Cir. 1992) (holding that "evidence of a blatant disparity is sufficient to support a prima facie case of discrimination."). Dolan's evaluation and termination process, however, was standard for probationary employees, and complied with Postal Services procedures. As a probationary employee, she was not governed by the progressive disciplinary scheme utilized for non-probationary employees. Even though Dolan's evaluation was completed prior to her 30th day at the Postal Service, she was nonetheless terminable at-will because of her probationary status. Moreover, the instructions simply required supervisors to complete the form "by" 30 days.

The circumstances of Dolan's separation are largely indistinguishable from those of the other two probationary employees separated from the Postal Service. Hancock and Drew were employed 36 and 52 days, respectively, when they were separated due to unsatisfactory performance and failure to follow instructions. Neither was afforded the benefit of an evaluation.

Probationary employee Tiarra Cheatham, on the other hand, was not terminated after receiving a 30-day evaluation that included four unsatisfactory ratings and one satisfactory rating. She went on to successfully complete the 90-day probationary period with satisfactory ratings in every category. Dolan, on the other hand, received all unsatisfactory categories when she was evaluated after 21 days and terminated. While Cheatham may have bested Dolan in only one category—work relations – the Postal Service's decision to give her the opportunity to improve merely highlights the benefit of the doubt accorded an employee who worked well with co-workers and supervisors.

The General Counsel's reliance on the disciplinary records of employees Gard, House, Atakpa and Bronson is misguided as none of the four employees are similarly situated to Dolan. No inference of unlawful discrimination can be made where there are differences in treatment between or among employees who are not similarly situated. See, e.g., *Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672, 674 (2004) (finding no disparate treatment where confessing employee was not disciplined while employees who did not acknowledge their wrongdoing were disciplined). Gard's former job title at the Postal Service is unknown, House was a mail handler, and Atakpa was a mail handler assistant. Bronson was a PSE, but was a casual/transitional employee. None of these employees were identified as probationary employees.[35] The General Counsel relies on the fact that none of these employees were discharged for leaving their workstation, but fails to consider that Dolan was also terminated for failing to follow instructions, unsatisfactory work performance, and causing significant problems on her assigned equipment.

In *Merillat Industries*, 307 NLRB 1301 (1992), the Board found that the employer's termination of the discriminatee was consistent with its treatment of other employees, even though a more tenured employee was not terminated for similar conduct. Id. at 1303. The Board noted that an 8(a)(3) respondent will rarely be able to present evidence of past employees who were discharged under identical circumstances to those of the discriminatee. Id. at 1303 fn. 10.

After considering the fact and circumstances relating to Do-

[35] The information relating to Bronson is inconclusive given that he was a "casual/transitional employee" who was terminated about one month after a mostly unsatisfactory 30-day evaluation.

lan's separation, including evidence of the Postal Services comparable treatment of other nonprobationary employees, I conclude that the General Counsel failed to demonstrate by a preponderance of the evidence that Dolan was separated in retaliation for her union activities.

IV. DOLAN WOULD HAVE BEEN DISCHARGED EVEN IN THE ABSENCE OF HER UNION ACTIVITIES

Assuming, arguendo, that Dolan's separation was attributable to unlawful motivation, the preponderance of the evidence further supports the Postal Service's claim that it would have separated her regardless of her protected activities. *Manno Electric,* 321 NLRB at 281; *Tinney Rebar Services* , 354 NLRB 429 (2009) (endorsing the employer's *Wright Line* defense after weighing the employer's practice of terminating employees who intend to resign against the employer's animus).

Dolan's supervisors reported that she failed to accept instructions without complaining, did not always clock in and out appropriately, and did not perform her job duties adequately. Dolan conceded that she complained about her assigned job tasks and did not clock out properly on one occasion. She presented no valid justification for these complaints, as she was cleared to work without medical restrictions by her doctor prior to commencing her employment at the Ybor facility. Prior to September 7, Dolan's chronic complaining about her job assignments foreshadowed a likely negative evaluation. Under Postal Service procedures, Dolan's supervisors could have waited another 9 days before completing her evaluation. However, Dolan's failure to return to her work station, thereby causing mail to back up, spurred a decision by Flick and Wray to complete Dolan's evaluation and separate her that day.

The General Counsel argues that Postal Service supervisors circumvented applicable timeframes in their quest to separate Dolan. However, Dolan was not the beneficiary of any such provisions. Article 12 of the ELM does state that the Postal Service must give at least 7 days advance notice to a probationary employee who is being separated for "scheme failure." There is no evidence in the record, however, defining a scheme failure, much less evidence that Dolan was separated for that reason. Although she was qualified for her position, Dolan simply did not meet the standards set by the Postal Service and her supervisors, leading to her separation. Accordingly, the Postal Service has met its burden of demonstrating that it would have fired Dolan regardless of her union activity.

Based on the foregoing, the General Counsel failed to prove by a preponderance of the evidence that the Postal Service disciplined and separated Dolan on September 7, 2017, in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, United States Postal Service, provides postal service for the United States and operates various facilities throughout the United States. The Board has jurisdiction over Respondent and this matter by virtue of Section 1209 of the Postal Reorganization Act.

2. The American Postal Workers Union, AFL–CIO and the American Postal Workers Union, Local 259, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. The United States Postal Service did not violate Section 8(a)(3) and (1) of the Act.

4. Ann Dolan was terminated by the United States Postal Service on September 7, 2017, for legitimate business purposes due to her failure to follow instructions, long work breaks and her resistance towards work assignments, and not because she engaged in union or other protected concerted activities.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[36]

ORDER

The complaint is dismissed.

Dated: Washington, D.C. July 16, 2018

[36] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.